

# The Elephant in the Room? The Free Movement of Services and Brexit.

*By Gavin Barrett*

To date, the debate around the economic implications of Brexit has focused largely on the free movement of goods and the potential for regulatory and physical barriers to trade between the UK and EU, and between Ireland and Northern Ireland. The political importance of these issues is clear, and their economic significance should not be underestimated. Ironically, however, given all this focus on the free movement of goods, the production of, and trade in, goods has long ceased to be the primary economic activity of most modern economies.

There has been comparatively little focus on the issue of services, which make up about three quarters of the UK's economic output, and about 70% of the EU's economic activity. How might Brexit impact on this vitally important, and growing, sector?

This IIEA paper, by Gavin Barrett, Professor of Law at the Sutherland School of Law, University College Dublin, aims to address this question, and to focus attention on an issue that is, and will continue to be, of key importance in the years and decades after Brexit has taken place.

## EXECUTIVE SUMMARY

### KEY TAKEAWAYS

In light of the size and importance of the services industry in both the UK and the EU, the issue of services will be a focus of particular concern in the negotiations between the United Kingdom and the European Union concerning their future economic relationship.

Services, however, are far more complex and varied than goods in nature, and it follows that the trade in services is significantly more difficult to regulate than trade in goods.

The free movement of services and the free movement of people cannot be easily separated, practically or politically. If the UK leaves the Single Market because it cannot accept the free movement of EU citizens on its territory, then it must accept that the free movement of services to and from the EU will also end.

Most free trade agreements do not extend to services, and those that do offer only partial coverage. In order to protect the UK's status as a global leader in trading services, any EU-UK free trade agreement would need to be both radical and broader than anything seen before.

# THE ELEPHANT IN THE ROOM? THE FREE MOVEMENT OF SERVICES AND BREXIT <sup>1</sup>

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## Introduction

Anyone focusing on the debate on Brexit would be forgiven for thinking that the most important economic issues raised by Brexit relate to the free movement of goods and concern such issues as the terms of WTO standards on the trade on goods, tariffs, the Customs Union and the agricultural, health, and consumer protection checks on goods carried on cross-channel ferries crossing frontiers such as that between Ireland and Northern Ireland. The political importance of such issues is clear, and their economic significance should of course never be underestimated. Ironically, however, given all this focus on the free movement of goods, the production of, and trade in, goods has long ceased to be the primary economic activity of most modern economies. Notwithstanding this, there has been comparatively little focus on service-related issues in the ongoing Brexit debate. This paper is an attempt to help remedy that particular lacuna and to focus attention on an issue that is, and will continue to be, of key importance in the years and decades after Brexit has taken place. The issue of services, including financial services, is guaranteed to be a focus of particular concern in the negotiations between the United Kingdom and the European Union concerning their future economic relationship.

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It is as well to begin any discussion of services by putting matters in their economic and legal context. It is almost a truism to point out that the services sector has become hugely significant at global level, at European Union level and for a United Kingdom currently engaged in the process of terminating its membership of the EU.

### At global level

Globally, services represent on average about two thirds of the economic output in developed economies. They account for a lower proportion of international trade as a whole – between 20 and 25% - but a growing one,<sup>2</sup> with growth being aided by advances in the uses and capacities of technology and by the interconnectedness and interdependence of modern economies.

### At European Union level

In the EU, it has been estimated that services make up about 70% of economic output.<sup>3</sup> At this level, services account for a lower proportion of cross-border trade as a whole, but still a highly significant one, with one fifth of services in the EU crossing a border.<sup>4</sup>

<sup>1</sup> This is an edited and amended version of a chapter published in in F. Kainer and R. Repasi (ed.) *Trade Relations after Brexit* (Nomos/Hart, Oxford, 2019).

<sup>2</sup> House of Lords European Union Committee, *Brexit: trade in non-financial services* (18<sup>th</sup> Report of Session 2016-17), (HL Paper 135), 10.

<sup>3</sup> The CityUK, ‘Brexit Deal Should be Ambitious and Comprehensive’, (statement published on website, 19.12.2017).

<sup>4</sup> House of Lords European Union Committee, *op. cit.*, n. 2, 3 and 9.

Legal provision for free movement of services is made in Articles 56 and 57 of the Treaty on the Functioning of the European Union. However, other provisions of both primary and secondary EU law also play a major role. Insofar as concerns Treaty provisions, Articles 49 and 54 TFEU are significant for providing for the freedom of establishment, thereby enabling the setting up of subsidiaries of businesses in other Member States. Most-cross border service provision is also supported by horizontal measures such as the 2006 Services Directive,<sup>5</sup> the 2004 Citizens' Directive,<sup>6</sup> which provides for the free movement of persons (needed by, *inter alia*, many service providers), and the umbrella 2005 Directive consolidating the law on the recognition of professional qualifications.<sup>7</sup> Sectoral legislation governing particular services has also been adopted over the years. One prominent example of this is the 1977 directive on lawyers' services.<sup>8</sup>

The single market in services is a much more recent development than integration in the free movement of goods area. What is now the European Union has involved a customs union since 1958, but has had a Services Directive only since 2006. A digital single market in services is still under construction.<sup>9</sup>

**'Services are not like goods. It is much more difficult to create a single European market in services than it is in goods. Services are far more complex and varied in their nature.'**

Services are not like goods. It is much more difficult to create a single European market in services than it is in goods. Services are far more complex and varied in their nature: thus, for example, some services can be traded online whereas others (such as medical or dental treatment) may require to

be provided in person and thus require the free movement of persons to be guaranteed in order for them to be freely traded. Other services again may be embedded in goods. (The archetypal example of this is software in computers.)

Furthermore, services are delivered using a variety of methods. No less than four different ways of delivering services are provided for in the WTO's General Agreement on Trade in Services (GATS): (i) cross-border provision, *i.e.* from one state to another; (ii) where the consumer crosses the border to the provider; (iii) where the service is provided via a subsidiary or branch of the service provider; and (iv) where the service provider crosses the border temporarily.<sup>10</sup> Even obstacles to services can be more complex than those to goods. Goods can be restricted by tariffs whereas services are largely unaffected by these and instead tend to be restricted by a variety of non-tariff barriers such as licensing requirements and other regulations.<sup>11</sup> As Rogers puts it, "services trade is extremely hard to liberalise as you are dealing with entrenched cultural preferences and intractable regulatory barriers."<sup>12</sup> It is nonetheless by dismantling such barriers and thereby reducing transactions costs that the EU single market in services functions.

Because of such challenges, the single European market in services is significantly less integrated than the single market in goods (with only approximately one fifth of services provided in the EU involving the crossing of a border).<sup>13</sup> A further reason for the comparative lack of integration in the services field at international level is that there is no equivalent to the Common Commercial Policy (which applies to the free movement of goods) in the area of the free movement of services, *i.e.* there is no uniform/harmonised trade regime for trading with non-single market countries.<sup>14</sup>

If, because of considerations like these, the single market in services is significantly less integrated than the single market in goods, it is nonetheless also the case that the European Union has the most integrated international services market in the world. Moreover, the degree of integration involved in it looks likely to increase.<sup>15</sup>

<sup>5</sup> Directive 2006/123/EC; House of Lords European Union Committee, *op. cit.*, n. 2, 18.

<sup>6</sup> Directive 2004/38/EC.

<sup>7</sup> Directive 2005/36/EC.

<sup>8</sup> Council Directive 77/249/EEC. General practitioners, nurses, veterinary surgeons, pharmacists and architects have also been the subject of sectoral measures on the mutual recognition of qualifications, and there have also been directives concerning particular industries and sectors of the economy such as food and beverage, the coal trade, and the wholesale, intermediary and retail sectors. (See further Craig/de Búrca, *EU Law*, (6th Edition, 2015), 842 f.)

<sup>9</sup> House of Lords European Union Committee, *op. cit.*, n. 2, 90.

<sup>10</sup> House of Lords European Union Committee, *op. cit.*, n. 2, 11.

<sup>11</sup> See V. Romei, "Dark Matter that Matters' in UK Trade with EU' *Financial Times* (17.12.2017).

<sup>12</sup> I. Rogers, "Where did Brexit Come From and Where is it Going to Take the UK?" (lecture, UCL European Institute, 22 January 2019), 14.

<sup>13</sup> See generally on services in the single market, e.g., Andenas/Roth, *Services and Free Movement in EU Law*, (2002); Snell, *Goods and Services in EC Law: A Study of the Relationship Between the Freedoms*, (2002); Barnard/Scott, *The Law of the Single European Market: Unpacking the Premises*, (2002).

<sup>14</sup> House of Lords European Union Committee, *op. cit.*, n. 2, 86.

<sup>15</sup> *Ibid.*, 29.

## At UK level

Focusing more closely on the position of the United Kingdom as regards services, by 2015 the UK was the second largest exporter of services in the world, providing 7.1% of total global service exports. (The United States was some way ahead as the world's leading exporter, supplying a full 15.6% of global service exports.) After the UK came China, Germany and France in that order.<sup>16</sup> Overall, it has been estimated that services account for approximately three quarters of the UK's economic output and about 44% of the UK's international trade.<sup>17</sup> At the time of writing, these proportions are growing,<sup>18</sup> with tradeable services the fastest-growing element of UK trade.<sup>19</sup>

***'... it has been estimated that services account for approximately three quarters of the UK's economic output and about 44% of the UK's international trade'***

A lower proportion of UK service exports than exports of goods go to the EU (37% vs. 48% for goods), but for all that it is both important and the most integrated market for services in the world.<sup>20</sup> The EU collectively is the UK's single largest market for services, worth over 70% more than its nearest rival, the US,<sup>21</sup> and worth more than all eight countries comprising the UK's next largest purchasers of services.<sup>22</sup> Unlike in goods, the UK has a surplus with the EU in both financial and non-financial services. Overall, service exports to the EU represent 4.8% of the UK's entire GDP.

## The Particular Case of Financial Services

Some brief points may be made about the topic of

financial services in particular.<sup>23</sup> The significance to the European economy of financial services provided from the UK is large: in total, over a quarter of the EU27's total demand for financial services is met by the UK financial services industry.

***"... to an undetermined extent, EU states are in a state of mutual dependency on each other when it comes to financial services."***

The UK financial services centre earns between €217 and €234 billion in revenues and generates between €68 and €76 billion in taxes.<sup>24</sup> Dependence, of course, is mutual. The UK economy relies on EU demand for financial services. The other EU states, however, depend on the UK to supply those services.<sup>25</sup> Unsurprisingly, given the scale of economic activity involved, however, there is also rivalry between London and other financial centres such as Paris, Frankfurt, Luxembourg, Dublin and Amsterdam in providing such services. Nevertheless, the provision of financial services is clearly not entirely a zero-sum game. In other words, it is not necessarily the case that a decline in the fortunes of London in providing financial services will be matched by a corresponding increase in the fortunes of financial service centres in the EU27. The City of London may be regarded as constituting a financial ecosystem within the European Union of unique mass. If badly damaged, there is a danger that instead of other financial centres in the EU profiting and correspondingly increasing their business, all concerned will lose and the business will pass to non-EU locations such as New York or Tokyo.<sup>26</sup> Another way of putting this is that, to an undetermined extent, EU states are in a state of mutual dependency on each other when it comes to financial services.<sup>27</sup>

16 Ibid., 10. Such statistics should come with something of a health warning regarding their ability to mislead: it is notoriously difficult in particular to measure the impact of (a) foreign-controlled enterprises and subsidiaries providing services and (b) services provided when a person moves from one country to another. (Ibid., 11, and 13-15).

17 House of Lords European Union Committee, op. cit., n. 2, 10.

18 Ibid., 15.

19 I. Rogers, "Where did Brexit Come From and Where is it Going to Take the UK?" (lecture, UCL European Institute, 22 January 2019), 14.

20 Romei, loc. cit., n. 11.

21 Ibid.

22 See more generally S. Jack, 'Brexit: Business Secretary Greg Clark Warns on Services', BBC News website (21.06.2018).

23 See more generally Alexander/Barnard/Ferran/Lang/Moloney, *Brexit and Financial Services Law and Policy* (2018).

24 See Oliver Wyman, *The Impact of the UK's Exit from the EU on the UK-Based Financial Services Sector* (Marsh and McLennan, 2018) 2. (Figures converted into euro by the author.)

25 European Research Centre for Economic and Financial Governance, *Implications of Brexit on EU Financial Services* (Study for the ECON Committee, European Parliament (IP/A/ECON/2016-22, PE 602.058), 9.

26 For a description of the EU27's own financial interest in maintaining this ecosystem, see (the rather optimistically entitled) J. Ford, 'Why a Hard Brexit for Financial Services is Unlikely', *Financial Times* (10.12.2017).

27 An analogy may perhaps be drawn with the Amazonian rain forest. Were this to be destroyed, few would dispute that the world as a whole would be worse off, or expect planting trees in Germany or Norway to make up the difference.

Much of the discussion of financial services in the context of Brexit has focused on the issue of passporting such services, which is where meeting regulatory requirements in one Member State of the EU absolves a provider, under EU law, from the need to meet the corresponding regulatory requirements in the Member State of the service recipient. Passporting is undoubtedly a valuable right under EU law. On the other hand, a discussion of free movement of financial services cannot be reduced to consideration of this possibility. In reality, passporting is neither a universal nor a homogeneous practice by businesses established outside the EU (which is what British businesses will be once Brexit occurs). In the first place, non-EU businesses that establish a branch or subsidiary in an EU Member State no longer need to invoke any special passporting regime for non-EU companies. This is, of course, of considerable significance. Hence for example, 87% of companies that provide insurance to the EU27 have already established a branch or subsidiary in the EU27. Another factor limiting the importance of passporting is that equivalence regimes exist in relation to many financial services and provide some substitute for passporting, even if, admittedly, it is only a limited one: limited in that equivalence is (a) recognised at the discretion of the Commission; (b) is technically open to being withdrawn (although in practice never is); (c) has in the past sometimes taken several years to be granted; and (d) has not been provided for under EU legislation in all areas of financial services. It is not, for example, available in the field of wholesale banking (which would be highly problematic post-Brexit as without equivalence, UK-based banks would no longer be able to provide services to clients across the EU from the UK). Nor is it available in the field of asset management,<sup>28</sup> or in relation to UCITs.

Apart from the question of passporting, another issue which has given rise to discussion in the context of free movement of financial services is the considerable risk that in a Brexit situation, there would potentially be a threat to UK businesses in clearing euro-denominated trades - specifically, were the ECB to be given power to (re)introduce a location policy requiring that central counterparties be located in the Eurozone.

**‘For all the significance of financial services, however, what is not commonly realised is that the majority (72%) of services exported by the UK are non-financial in nature.’**

Such prospects are very much alive at the time of writing, the German finance minister having called for London’s multi-billion pound euro-clearing business to be relocated after Brexit occurs, and (perhaps unsurprisingly) suggested Frankfurt as an alternative location. Such plans fit well with the plans of *Deutsche Börse* to win at least a quarter of the market for clearing euro interest rate swaps from London in the short term.<sup>29</sup>

For all the significance of financial services, however, what is not commonly realised is that the majority (72%) of services exported by the UK are non-financial in nature. These cover areas such as telecommunications, broadcasting, tourism and aviation as well as professional services such as accountancy and law. In 2015, these accounted for 32% of the UK’s exports as a whole, with a total value of £62.9 billion, compared to financial service exports, which were worth £26 billion. While financial services constitute the biggest individual slice of UK services exports, the majority of service exports are, in fact, non-financial.<sup>30</sup>

Interestingly, non-financial services are not merely responsible for more exports than financial services. They also give rise to more jobs.<sup>31</sup>

### **Relevant Considerations in Negotiating a Brexit Deal on Services**

Some of the factors which have made agreement on free movement of services difficult to arrive at for the purposes of creating and developing a single European market were always likely to render a deal on free movement of services difficult to obtain in the negotiations concerning the UK-EU trade relationship in the wake of Brexit. As already noted, depending on the nature of the service at issue, free movement of services is frequently *intrinsically* dependent on the free movement

28 See generally, A. Tarrant, P. Holmes, R. D. Kelemen, *Equivalence, Mutual Recognition in Financial Services and the UK Negotiating Position* (Briefing Paper 27, UK Trade Policy Observatory, University of Sussex, January 2019), 3-4.

29 See generally Storbeck/Stafford, ‘Germany’s Olaf Scholz Suggests Euro Clearing Be Moved to Frankfurt’, *Financial Times* (08.06.2018). Cf. however Strauss, ‘Why is No One Talking About the City?’, *Financial Times* (12.06.2018), in which it is noted, however, that neither French nor German banks or companies (which benefit from London’s economies of scale) are lobbying for any such change. The same article gives an up-to-date idea of the highly uncertain outcome of discussions concerning services. For a review of the overall progress of negotiations, see e.g., Wolf, ‘Playing Chicken Over the Post-Brexit Irish Border’, *Financial Times* (14.06.2018).

30 See V. Romei, *loc. cit.*, n. 11.

31 House of Lords European Union Committee, *op. cit.*, n. 2, 86.

of persons. The latter freedom facilitates the provision of certain services, such as legal or medical advice, to clients and business partners. However, beyond this, free movement of persons also facilitates recruitment to service industries in which the UK leads Europe, such as the field of digital services. Industry seems to have been more aware of this point than the UK Government. Hence the CityUK (which represents the UK's financial services industry), from the beginning of the Brexit process, lobbied for "continued access by the UK to the best talent"<sup>32</sup> Depending on the circumstances, the free movement of services can be intrinsically linked to more than one other economic freedom. A good example of this is that it is common practice for aircraft engine manufacturers to sell their product at a loss. Profits are then made on the sale of services: inspections, maintenance and repairs, provided under contracts for these services that may endure for decades. In addition, providing these services requires free movement of persons, so that skilled workers can provide such services often at short notice.<sup>33</sup> Beyond such linkages, the insistence of the European Union on the indivisibility of the four freedoms has resulted in the free movement of services becoming *politically* dependent on the free movement of persons. In effect, what the EU27 are saying is that if the UK is not willing to accept EU27 nationals in its labour market, then the UK will no longer be allowed to enjoy the same access to the EU's services market. Overall, therefore, both by reason of intrinsic links between the economic freedoms and because of the refusal of the EU to countenance separate access to each of the four market freedoms, Prime Minister May's insistence on ending free movement of persons would imply (if put into effect) the death knell for UK participation in the Single European Market.<sup>34</sup>

Political considerations are part of the negotiations on free movement of services in another way as well. The European Union and the Eurozone have shown themselves adept at finding solutions to seemingly intractable political difficulties. The bailouts of Eurozone states (particularly in the bailouts in 2010, 2012 and 2015 of Greece); the construction from 2012 onwards of European Banking Union; and ECB's OMT and Quantitative Easing programmes of 2012 and 2015 respectively are all examples of solutions being found to crises where legal obstacles were considerable.

**'...the UK has been unwilling to permit the free movement of persons to the extent sought by the EU27, and the EU27 conversely unwilling to lower their demands (in terms of free movement of persons)...'**

There is a crucial difference between these political crises and the crisis represented by Brexit however in that the solutions to these earlier problems furthered the cause of European integration. An overly-generous deal on Brexit on the other hand, might be feared to do exactly the opposite, by effectively incentivising the disintegration of the European Union, and demonstrating that it is possible to secure the benefits of a fundamental economic freedom, without paying the usual price of acceptance of all three other fundamental economic freedoms and the financial and restrictions on national discretion that form part and parcel of membership both of the European Union and of the European Economic Area. For this reason, therefore, the objective of maximum free movement of services between the European Union and the post-Brexit (and post-transition period) United Kingdom has not been sought on the part of the EU27. In practice, the UK has been unwilling to permit the free movement of persons to the extent sought by the EU27, and the EU27 conversely unwilling to lower their demands (in terms of free movement of persons) to a level deemed acceptable to the United Kingdom.

### **Possible Negotiation Outcomes Regarding the Free Movement of Services**

The UK's preparations for negotiations on the free movement of services were unorthodox, to say the least. Rather than adopting the usual course in international negotiations of setting out its proposed objectives, it did the very opposite. Hence, for example, over the course of 2017 and 2018, it first deferred and then shelved a paper on financial services, purportedly to conceal its negotiating

<sup>32</sup> The CityUK, 'Brexit and UK-Based Financial and Related Professional Services', statement published on TheCityUK website (accessed 01.06.2018). Put another way, it has pushed for a globalisation objective, not the deglobalisation agenda (in the form of opposition to migration) that motivated at least some of the support for the Brexit vote. Véron, 'Brexit: When the Banks Leave', Bruegel (01.12.2017); the CityUK, 'Brexit Deal Should be Ambitious and Comprehensive' (statement published on website, (19.12.2017).

<sup>33</sup> S. Jack, 'Brexit: Business Secretary Greg Clark Warns on Services', BBC News website (21.06.2018).

<sup>34</sup> See Rogers, loc. cit., n. 12, 21-22. From an economic perspective, exit from the Single Market seems a high price to pay for the freedom to restrict immigration in a manner, which in any case seems of dubious long-term practicality.

hand, but in reality probably because of internal disagreement within the Cabinet on what the UK itself wanted.<sup>35</sup> An expected broader white paper setting out the UK position regarding its future relationship with the EU in advance of the June 2018 European Council was subsequently also postponed.<sup>36</sup> In the wake of the 2016 Brexit referendum and the subsequent giving of Article 50 notice by the United Kingdom on 29 March 2017, a range of outcomes became – and, as shall be seen, for a surprisingly long time, has remained – possible. Indeed, the parliamentary chaos engulfing Westminster at the time of writing means that no possibility can be definitively ruled out. For this reason, the entire range of possible outcomes is examined at least briefly here.

At the one extreme would be retention of EU membership with all the free movement rights this entails. However, this is an objective which could only be attained were the objective of Brexit itself abandoned, which might well necessitate (politically speaking) a second referendum reversing the result of the original vote. At the other extreme is the situation of a no-deal Brexit, obviously implying that the desire to seek Brexit be persisted with, and yet that no EU27–UK agreement at all be arrived at, including concerning the cross-border free movement of services. Various possible compromise positions are to be found along the route between these two extremes, on the model of stops along a tram line, travelling along a route of descending levels of integration. We can term the stops along this route: an ‘EEA-style agreement’ (or, more optimistically, an ‘EEA-plus-customs-union-style agreement’)<sup>37</sup>; a ‘CETA plus-style agreement’ (or, alternatively, an ‘EEA minus-style agreement’)<sup>38</sup>; a ‘Ukraine-style association agreement’; and a ‘CETA/Korea-style agreement’. The entry into force of any such agreement would have to be preceded by a transition period, since (even without addressing the issue of the legality of formal UK-EU trade negotiations with a UK which is still an EU member), there was never going to be enough time to complete any such trade negotiations and ratify their result before Brexit occurred.

The stop at which the Brexit tram pulls in has always depended on the willingness of the UK to make trade-offs. If it sought regulatory autonomy, then it was

inevitably going to face barriers to the Single European Market. If it sought access to the Single European Market, this implied losing regulatory autonomy. The price of single market participation would be to accept all four freedoms – free movement, in other words, of goods, persons, services and capital<sup>39</sup> – which the EU regards as coming as an inseparable whole, albeit perhaps with minor concessions possible, as has been the case with the EEA states.<sup>40</sup>

***‘The stop at which the Brexit tram pulls in has always depended on the willingness of the UK to make trade-offs.’***

It is proposed to examine each of the possible stops/negotiation outcomes to the Brexit negotiations before turning to the topic of how EU-UK negotiations themselves have proceeded to date.

#### Retention of EU Membership

The first step along our imaginary tramline would consist of the UK either staying in the European Union, or else re-entering it, having left it, and thus either way would involve either the retention or recovery of all free movement rights. Discussion of either possibility need not detain us for long here. At the time of publication (June 2019), the first eventuality – remaining in the EU – still seems unlikely to happen, though it cannot be ruled out.<sup>41</sup> Although, ironically, opponents of Brexit are now a popular majority, the shift may not be radical enough to guarantee that a second referendum would be won by ‘remainers’ and then be duly reflected in the actions of the UK parliament and government.<sup>42</sup> As for re-entry, once having left, it seems unlikely that re-entry into the EU would come about for many years, if ever. (It is noticeable that political resentment of the EU has grown in Switzerland since voting ‘no’ to membership of the EEA in 1992, with recent polls showing support for membership of the EU to have fallen to 11%.<sup>43</sup>)

35 Neilan, ‘Government Slammed for Forcing City Firms to Plan for Brexit’, City AM (05.09.2017); G. Parker, ‘UK Shelves Financial Services Brexit Position Paper’, Financial Times (22.01.2018).

36 See Pooley, ‘May Refuses to Commit to Date for Brexit White Paper after Delay’, Financial Times (06.06.2018).

37 With EEA here standing for ‘European Economic Area’, which came into being on 1 January 1994 on the entry into force of the EEA Agreement (signed on 2 May 1992, and adjusted by a Protocol signed on 17 March 1993).

38 With CETA here standing for the EU-Canada Comprehensive Economic and Trade Agreement signed on 30.10.2016.

39 House of Lords European Union Committee, *op. cit.*, n. 2, 9.

40 Note also the position of Switzerland and the Ukraine, although neither of these has full access to the Single Market. (See Demertzis/Sapir, ‘Brexit, Phase Two (and Beyond): The Future of the EU-UK Relationship’, Bruegel (13.12.2017), 3.)

41 In late February 2019 (at the time of writing), the Labour Party, subsequent to the departure of a number of its MPs objecting to its Brexit policy finally announced it would support a referendum if its preferred version of Brexit were not accepted. However, the existence even of sufficient parliamentary support for a further referendum was not apparent. (See J. Pickard, ‘Labour Party to Back Second Referendum on Brexit’, Financial Times (25.02.2019).)

42 See B. Kentish, ‘Voters Want to Remain in EU by 12-Point Margin as Brexit Opposition Reaches New High, Poll Finds’, The Independent (17.01.2019).

43 See Bolet, ‘Is Switzerland a Model for the UK-EU Relationship?’, LSE Brexit blog, <http://blogs.lse.ac.uk/brexit/2018/01/29/continental-breakfast-6-is-switzerland-a-model-for-the-uk-eu-relationship/> (accessed 01.06.2018).



## EEA-Style Agreement/EEA-plus-Customs Union-Style Agreement

Descending in terms of the level of European integration involved, a second possibility has been membership by the United Kingdom of the European Economic Area (this time as a state with a status similar to EFTA members Norway, Iceland and Liechtenstein) or else negotiation of an effectively similar relationship (whether or not combined with a similar customs relationship between the EU and the UK to that presently enjoyed by virtue of the UK's EU membership). Such a relationship would have a number of characteristics. It would bring with it continued access by the UK to the single European market in services. This would include passporting rights in the financial services area. However, the new relationship would function without the application within the United Kingdom of the doctrine of direct effect. In addition, there would be less of a guarantee that single market rules would be speedily implemented.<sup>44</sup> (The reason for this is, in the first place, that there is always a time lag between when a law is adopted at EU level and when it is added to the EEA Agreement. Furthermore, it has been noticeable that speedy implementation of single market rules by current non-EU EEA members has been far from guaranteed.<sup>45</sup>) An EEA-style relationship would be inferior to membership of the European Union in that EEA states have comparatively little power to influence the rules that will affect them, including in the field of free movement of services. Furthermore, the UK would also have to accept all four fundamental economic freedoms as part of such a relationship, although it is true that a slightly milder form of free movement of persons pertains than is the case for EU members.<sup>46</sup>

It is if the UK leaves the Single Market that estimates of how badly the City of London will be hurt begin to be the subject of particular focus. Projections vary considerably. Véron has estimated that in the event of the UK leaving the Single Market, between 15 and 25% of the City's business would migrate and come to be provided from an EU27 location.<sup>47</sup> To date, job losses have not been as great as feared<sup>48</sup> but concern on the part of UK service providers, particularly those in the financial sector, continue to be voiced as the date of Brexit approaches.<sup>49</sup>

## Free Trade Areas and the Free Movement of Services

<sup>44</sup> See further Alexander et al, op. cit., n. 23, 16.

<sup>45</sup> Most recently, Iceland, in particular, has attracted some criticism in this regard. (See European Commission, Single Market Scoreboard (Reporting period: 12/2015 - 12/2016), [http://ec.europa.eu/internal\\_market/scoreboard/\\_docs/2017/transposition/2017-scoreboard\\_transposition\\_en.pdf](http://ec.europa.eu/internal_market/scoreboard/_docs/2017/transposition/2017-scoreboard_transposition_en.pdf) (accessed 14.06.2018).

<sup>46</sup> See more generally Alexander et al, op. cit., n. 23, 16-17 and 62-64.

<sup>47</sup> Véron, 'Brexit: When the banks leave', Bruegel (01.12.2017), 2-4.

<sup>48</sup> See e.g., L. Noonan and R. Atkins 'UBS to Move Fewer London Jobs Than Initially Feared', Financial Times, (3.11.2017); and A. MacAskill, 'Brexit and the City: Taking London's Financial Pulse', Reuters (20.11.2017).

<sup>49</sup> See H. Jones, 'Former UK Financial District Leader sees 75,000 Brexit job losses', Reuters (20.06.2018); Strauss/Jenkins, 'Hammond Vows to Fight for City Over Post-Brexit Rules', Financial Times (22.06.2018); S. Jones, 'No-deal Brexit Could Return UK to 1930s, Says Senior Banking Figure', Financial Times (10.02.2019) and P. Stafford, 'Key London Markets Would be Left in the Lurch Under a 'No-Deal' Brexit' (1.10.2018).

***in the event of the UK leaving the single market, between 15 and 25% of the City's business would migrate and come to be provided from an EU27 location'***

Some general observations may be made concerning the next three possible steps for a Brexit-bound UK, all of which involve some or other version of a free trade area. Free trade areas involve agreements to cooperate to reduce trading barriers and thus to liberalise trade between two or more states. Usually they are concerned with trade in goods.

***'The Single European Market should thus be thought of as involving a single regulatory space, and a free trade agreement in contrast as involving two distinct regulatory spaces.'***

But any comprehensive free trade agreement could target trade in services as well. Free trade agreements vary greatly in terms of the market access they provide. However, what they have in common is that they provide only access to the market. They do not exempt from the duty to comply with local laws and regulations. In contrast, Single European Market rules involve mutual recognition, harmonised rules and a more level playing field as regards competition, social standards, environmental standards and data protection. The Single European Market should thus be thought of as involving a single regulatory space, and a free trade agreement in contrast as involving two distinct regulatory spaces. Although free trade agreements are sometimes described as

‘comprehensive’,<sup>50</sup> this description is merely relative: trade agreement provisions governing services begin at a low standard – and rules concerning financial services in particular lack mutual recognition provisions and tend to be riddled with exceptions. EU-UK trade in services governed by a free trade agreement would be far less free than it has been in the Single Market.<sup>51</sup>

Complicating the use of free trade areas in the context of Brexit is the requirement of Article V of the General Agreement on Trade in Services (GATS), under which such agreements must have “substantial sectoral coverage” – although what this means is uncertain and the provision is rarely relied upon in disputes.

Another potential obstacle to a deal for the UK covering services is that the ‘most favoured nation’ clauses in free trade deals with other countries such as Canada, South Korea, the Caribbean islands and Singapore (all of which have some provisions on services of their own)<sup>52</sup> might oblige the EU to offer a similarly generous deal concerning services to these countries as that offered to the UK concerning services – without, however, having secured any *quid pro quo* justifying such a concession to these other countries. There are certain exemptions to the applications of these provisions which might arguably apply.<sup>53</sup> However, an EU reluctant to reach an accord can seek to shelter behind most favoured nation clauses in existing free trade deals.

In order to protect the UK’s status as a global leader in trading services, any such EU-UK free trade agreement would need to be both radical and broader than anything seen before, including CETA – which itself has been described as “the most comprehensive free trade agreement in services ever agreed”.<sup>54</sup>

**‘In order to protect the UK’s status as a global leader in trading services, any such EU-UK free trade agreement would need to be both radical and broader than anything seen before, including CETA.’**

The free trade agreement would need to be radical, in that it would require stronger institutions than the normal state-to-state dispute settlement mechanisms in free trade agreements. (By definition, of course, such a free trade agreement would be radical in another, rather different way, in that it would have as its aim the restriction of trade between the parties, currently set at the higher level of a customs union.) An EU-UK free trade agreement would also need to be broad in that the use of a free trade agreement to provide wholesale access to service market would be unprecedented. Numerous service areas would need to be facilitated in order to prevent serious disruption to the businesses of UK service providers. To take just two examples, such an agreement would need to provide for UK airlines flying between EU27 states and within them. Furthermore, the rights of UK broadcasters to broadcast into the single European market – which affects 60% of all UK channels – would need protection. Similar issues exist across a swathe of other sectors. Not alone has a deal of so ambitious a nature never been entered into by the European Union before, but certain areas e.g., audiovisual media services, have been specifically excluded from all free trade agreements until now.<sup>55</sup> Given the great variety in the nature of services (a topic touched upon already), it is clear that the negotiation of a free trade area covering free movement of services would take a long time, possibly necessitating a lengthy transition period, so as to avoid a regulatory cliff edge if negotiations went on too long.<sup>56</sup> Complicating matters, the EU does not have a harmonised third country trade policy in services. A free trade agreement in this field, unlike in the free movement of goods area, would probably be a mixed agreement with all the ratification challenges and delays that this would involve.<sup>57</sup> (In the latter regard, the October 2016 blocking of the CETA accord by the Wallonian parliament, although eventually defused by a compromise acceptable to all concerned, is a far-from-distant memory.<sup>58</sup>)

The fact that such an ambitious free trade agreement – in effect, a kind of half-way house between a normal free trade area and a single market – has never been agreed upon before does not mean that it could not be agreed in the context of Brexit. However, its negotiation and ratification

50 An example of this being CETA, the Comprehensive Economic Trade Agreement.

51 See Tarrant et al, op. cit., n. 28, 8-9.

52 Note also the draft free trade agreement with Japan, which has a similar such clause.

53 Namely, if the EU-UK deal creates an internal market between the partners, grants the right of establishment to each side’s businesses or if the deal involves “approximation of legislation”, involving one party aligning its rules to the others, or else common rules. See further Hogarth, ‘EU Barred from Striking Favourable Brexit deal on City’, The Times (22.01.2018).

54 House of Lords European Union Committee, op. cit., n. 2, 22-24

55 Ibid., 89.

56 See House of Lords European Union Committee, op. cit., n. 2, 9 and 25.

57 Ibid., 29.

58 See Brunsdon, ‘Belgium’s Walloon Parliament Blocks EU-Canada Free-Trade Deal’, Financial Times (14.10.2016).

would clearly be no simple matter and there must be some doubt as to whether agreement could be reached at all on many aspects.<sup>59</sup> Where there is a will, there tends to be a way. However, as will be seen, there has been a distinct absence of will - both on the EU side, and, far more remarkably, on the UK side - to reach an ambitious arrangement extending generally to services. On the EU side, at least, this was only to be expected. The EU must, after all, be seen to confine the major benefits of membership of the European Union to Member States of the Union itself, if it wishes to safeguard the stability of the EU as an international organisation, and the attractiveness of participation in the EU to its component states.

#### CETA plus-style (or EEA minus-style) agreement

Continuing along our metaphorical tramline to possible future destination points for Brexit negotiations (and descending a further level in terms of ambition), one arrives at the idea of a CETA plus-style (or EEA minus-style) agreement. Some hope of what might be termed such an agreement, falling short of full membership of the Single European Market, was given rise to at one point by statements by leading French and German politicians referring to the possibility of a “half-way house between Norway and free trade”<sup>60</sup> and of creating a “model for countries like Turkey or Ukraine.”<sup>61</sup> One advantage of such a relationship, from the EU’s point of view, would be that it would keep the United Kingdom safely within the EU’s orbit as a kind of economic satellite.<sup>62</sup> A second advantage is that it would also help fill the Brexit-shaped hole in the EU budget, because the UK would of course be expected to pay for the privilege of such a relationship.<sup>63</sup> Thirdly, and as already indicated, such a relationship could function as a model for countries that want to be close to the European Union, without however joining it.<sup>64</sup>

#### Ukraine-style association agreement

To continue our imaginary tram-ride, less extensive free trade agreements would also be possible. The EU-Ukraine agreement, sometimes referred to as a “deep and comprehensive free trade agreement” was signed in 2014 and entered into full effect in September of that year. It does not involve membership of the Single European

Market but does include extensive market access for goods and services, although less in the case of services than that of goods. It involves a certain level of free movement of persons, with visa liberalisation and a work permit scheme. The enforcement aspect of the agreement at least initially might have been thought unacceptable to the UK – it involves an arbitration panel, bound by the European Court of Justice. Furthermore, the agreement requires ‘regulatory alignment’,<sup>65</sup> which might also have been expected to incur the dislike of Brexit advocates. However, as shall be seen, in *both* respects, initial red lines in the UK’s negotiating approach proved more malleable than might have been thought.

#### CETA/Korea-style agreement.

Moving onwards (and downwards) from the ‘deep and comprehensive’ Ukraine free trade agreement to ‘ordinary’ free trade agreements, free trade agreements of this latter kind have not led to very extensive liberalisation of trade in services, although they have had *some* coverage of services. Examples are the Swiss-EU bilateral agreements (which cover public procurement, air transport and the free movement of persons); the EU - South Korea free trade agreement (which covers intellectual property, lawyers, telecommunications and transport); and the EU-Canada CETA agreement (which covers post, telecommunications and marine transport).<sup>66</sup>

As regards their modus operandi, such agreements adopt one of two approaches. Either they list sectors they liberalise (the so-called ‘positive list’ approach) or, like CETA, they have a ‘negative list’ of sectors that they do *not* liberalise.

The very limited nature of agreements of this nature adopted by the EU to date should also be borne in mind. For example, there is no adoption of the EU *acquis* in CETA. It is purely an international law agreement. Adopting such an arrangement would involve a major deterioration from the present position.<sup>67</sup> For example, under such a system, no passporting would be allowed. Although CETA is a good deal in services by world standards, it has been accurately described as failing to give Canada or the EU a uniform position in each other’s markets. Over 500 exemptions of either a regional or sectoral nature (and regarding

59 See recently in this regard, Anon., ‘Bankers to Ask May Why they Should Stay in London after Brexit’, Financial Times (14.06.2018).

60 G. Parker, ‘Macron Boosts May’s Hopes of Bespoke EU Trade Deal’, Financial Times (20.01.2018).

61 Anon., ‘Brexit Model Could Influence Turkey and Ukraine Deals’, RTE News online (26.12.2017), (accessed 01.06.2018).

62 Duff, ‘Brexit: Launching Satellite Britain’, European Policy Centre Discussion Paper, (05.12.2017).

63 G. Parker/Hughes/Milne, ‘May Urged to Back ‘Norway-Style’ Payments’, Financial Times (22.01.2018).

64 Anon., ‘Brexit Model Could Influence Turkey and Ukraine Deals’, RTE News online (26.12.2017), (accessed 01.06.2018).

65 Barber ‘Ukraine May be Closer than Norway to UK Post-Brexit’, Financial Times (09.01.2018).

66 House of Lords European Union Committee, *op. cit.*, n. 2, 20-21.

67 European Research Centre for Economic and Financial Governance, See more generally Alexander et al, *op. cit.*, n. 23, 18.

matters as diverse as the qualifications required of service providers, nationality requirements and stipulations as to their corporate form) take from CETA's general provisions liberalising services. Adherence to such a regime would potentially involve a loss of a large proportion of UK service exports to the EU.<sup>68</sup>

***'Although CETA is a good deal in services by world standards, it has been accurately described as failing to give Canada or the EU a uniform position in each other's markets.'***

As for the Swiss agreement on access, this applies only to a very limited section of financial services, and in any case, largely involves only the WTO GATS regime. It was never clear that a Swiss-style arrangement would be on offer in any case, as the European Union had clearly become unhappy with the EU-Switzerland agreement itself, and is currently pursuing the objective of an 'institutional framework agreement'. This would replace and update the proliferation of bilateral agreements which provide for Swiss access to the single market, and provide for a role for the European Court of Justice - something an unenthusiastic Switzerland had managed to avoid up until now.<sup>69</sup>

#### The 'No Deal' Scenario

The stop along the line for the Brexit process involving the least degree of integration would be a 'no deal' scenario. This possibility was trumpeted rather puzzlingly by Theresa May for some time as being "better than a bad deal".<sup>70</sup> It would leave the United Kingdom trading services with European Union Member States on the basis of WTO rules. The General Agreement on Trade in Services, in force since 1995, would be the main treaty governing trade in services in such a scenario. The UK would have to have its own schedule of concessions and commitments regarding international trade and to have that certified by other WTO countries. It would be likely to seek to replicate the existing schedule, which relates to the

EU Member States. Obviously, WTO rules would be worse than trading services on the basis of the single European Market, or under free trade agreement rules of any description. But it is nonetheless capable of being done. Trade in services with the US (the UK's biggest trading partner for services) is, after all, governed by WTO rules. The effect would vary depending on the service sector involved. Regulated sectors (lawyers, doctors, accountancy firms etc.) would face barriers to trading (perhaps complete barriers).

***'WTO rules would be worse than trading services on the basis of the single European market, or under free trade agreement rules of any description. But it is nonetheless capable of being done.'***

Unregulated sectors would not. Potential problems with the WTO regime include (1) the fact that enforcement would be problematic for private parties under a WTO-based regime because the WTO's dispute resolution process is state-led; (2) the fact that, based as they are on a global organisation, the WTO's rules are not a system well adjusted to fast-changing industries e.g., digital services; (3) the fact that some services are simply not covered by the EU's GATS Schedule of Commitments (e.g., audiovisual media services, air services, and publicly-funded services, so that the areas of health and education, for example, would only be covered to a restricted extent);<sup>71</sup> and (4) the fact that free movement of persons and data protection are not provided for under WTO rules. Overall, the choice to leave without a deal and therefore to have resort to WTO-only freedoms would be an astonishing one to take from an economic point of view. Rogers has asked pointedly "how one can seriously argue that the only bloc with which one does not need a free trade deal is that one with which one does easily the largest amount of trade?". He also pointed out that choosing the WTO option involves "having to try and scramble your way back up the hill to a preferential deal, under huge time pressure, notably in those many sectors and issues on which a resort to WTO rules

<sup>68</sup> See generally, Rogers, loc. cit., n. 12, 14.

<sup>69</sup> See Atkins, 'Switzerland Readies Counter Measures as Bourse Row with EU Intensifies', Financial Times (08.06.2018).

<sup>70</sup> Mrs May was originally quoted as saying that "I am... clear that no deal for Britain is better than a bad deal for Britain" on 17 January 2017. The expression subsequently found its way into the Conservative Party manifesto for the June 2017 election, although its use has become increasingly rarer as time has gone on. (See for one commentary on this Chu, 'Theresa May's 'No Deal is Better Than a Bad Deal' Brexit Logic Could End Up Destroying the British Economy', The Independent (28.05.2017).)

<sup>71</sup> House of Lords European Union Committee, op. cit., n. 2, 89 and 90. Other areas are protected to a lower standard e.g., intellectual property rights which are protected under the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS').

gives you nothing” and observed that “the reality is that you would, in exiting to WTO terms, reset the baseline for future FTA talks in the worst possible place for UK negotiators,” WTO rules providing merely a foundation on which to build in seeking deeper freeing up of trade.<sup>72</sup>

## Developments During the Negotiations on Brexit and their Relevance to the Free Movement of Services

The above section has addressed the future possibilities which have existed from the time the path of seeking Brexit was first embarked upon, and indeed - given the lack of substantive progress made along that path - which *still* exist. Nevertheless, time has not stood still since Article 50 notice was first given and it is proposed to consider the course of the negotiations to date and how these relate to the area of free movement of services. A brief timeline of negotiations to date of the time of writing is that on 29 March 2017, Prime Minister May notified the European Council under Article 50 TEU of the UK’s intention to withdraw from the EU. Negotiations began on 19 June.<sup>73</sup> An EU-UK Joint Report was published on 8 December 2017, setting out areas of agreement (in particular on citizens’ rights, a financial settlement and the Northern Irish border). This was followed by various stages,<sup>74</sup> before the European Commission and UK negotiators agreed on both a Withdrawal Agreement and an outline of the political declaration on the future EU-UK relationship on 14 November 2018.

Certain steps along the way were of particular importance as regards free movement of services, however, namely Theresa May’s March 2018 Mansion House speech, the Chequers declaration and then UK Government White Paper of the following July.

### Mansion House speech

Some idea of the UK Government’s original vision for financial services in particular, was finally (belatedly) expressed by Theresa May in her Mansion House speech in March 2018, in which

she called – albeit remaining somewhat vague as regards the details<sup>75</sup> - for a “comprehensive system of mutual recognition” including establishing in the financial services field in particular “the ability to access each other’s markets, based on the UK and the EU maintaining the same regulatory outcomes over time”.<sup>76</sup>

As Tarrant *et al* explain, in general terms “equivalence” and “mutual recognition” can both be described as processes by which goods or services produced in a first country (the “home country”) are recognised as being compatible with the standards set in a second (the “host country”). However, they go on to state:

*Mutual recognition is in principle comprehensive: it allows all goods and services meeting the regulatory standards set in the home country to be sold in another without any further assessment beyond those applied in the home country. Equivalence, conversely, requires that the host country assess whether the regulatory standards of the home country meet the regulatory requirements of the host country, with respect to particular sets of home country products, before they are allowed to enter the host market. The application of mutual recognition in financial services within the EU provides for “passporting”, the process by which a service provider authorised in one member state does not require authorisation in another Member State in order to offer services in the latter.*<sup>77</sup>

There are clear problems with any vision of EU-UK relations in financial services being based essentially on mutual recognition and passporting, however. In the first place, it is anachronistic, a vision gradually being left behind even within the EU. Thus, since the 2008 financial crisis, the EU has distanced itself from mutual recognition in favour of a more centralised harmonisation approach.<sup>78</sup> Harmonisation provides more confidence that foreign service providers will be effectively regulated, and that host country interests will be taken into account in the event of a crash, assurances that are absent in a mutual recognition regime.<sup>79</sup> May’s approach involved rejecting any such harmonisation, however.<sup>80</sup>

72 See Rogers, loc. cit., n. 12, 14.

73 Their commencement was delayed by the UK’s general election in which May’s Conservatives returned to power but only as a minority administration.

74 Namely, a February 2018 Commission draft Withdrawal Agreement, a March 2018 amended version (with highlighted areas of agreement and disagreement) and a June 2018 Joint Statement.

75 See for one attempt at deciphering what was intended, Tarrant et al, op. cit., n. 28, 5.

76 See T. May, Speech on our Future Economic Partnership with the European Union, 2 March 2018, available at <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>

77 Tarrant et al, op. cit., n. 28, 5-7.

78 As Stefaan de Ryneck, adviser to EU Chief Brexit negotiator, Michel Barnier noted in a speech delivered in the London School of Economics, “the EU has moved away in the wake of the financial crisis from mutual recognition of national standards to a centralised approach with a single EU rule book and common enforcement structures and single supervisory structures.” (Quoted in P. Wintour, ‘EU Brexit Adviser Deals Blow to Theresa May’s Free-Trade Proposal’, The Guardian (6.03.2018).)

79 Tarrant et al, op. cit., n. 28, 4-5.

80 The former Head of the UK’s International Trade Department, Sir Martin Donnelly had already pithily pointed out the difficulty here, asking “can we negotiate

Secondly, in looking for a comprehensive system of mutual recognition, Mrs May looked for something which actually never existed within the Single Market, where various excuses (e.g., health protection, consumer protection and environmental protection) have been accepted, allowing Member States to derogate from recognising each other's standards. Even inside the Single Market, therefore, mutual recognition is non-absolute and conditional, and expecting more than this for a state outside the Single Market was never realistic.<sup>81</sup>

***'... in looking for a comprehensive system of mutual recognition, Mrs May looked for something which actually never existed within the Single Market'***

Thirdly, and most seriously, May's idea of mutual recognition based on binding commitments to EU-level regulatory standards failed to recognise that the EU "is a rules-*plus* system. It is based on common rules but also common institutions and common constitutional principles". As Weatherill has pointed out, in order to generate the trust needed to facilitate frictionless trade in the Single European Market, the "EU[...]built on rules and[...] built on trust[...] is also built on institutional and constitutional frameworks that underpin those rules and verify that trust is warranted[...] what the Commission has lately taken to describing as the EU's 'ecosystem'".<sup>82</sup> In a speech thus demanding simultaneously the right to leave the Single Market, its institutions and principles behind, and yet also demanding the ability to keep greater rights of access to it than even EU states possessed, May came "perilously close to asking for the obligations of Canada and the rights of Norway".<sup>83</sup> Her speech failed to appreciate "the intensity of the obligations that are required to generate trade integration

on the truly deep and special scale that the EU's internal market has achieved."<sup>84</sup> These include the role of institutions like the Commission and the Court of Justice, and the role of principles like direct effect and supremacy.<sup>85</sup>

### **Chequers**

Notwithstanding whatever light was shed on matters by the Mansion House speech, throughout most of the Article 50 notice period, negotiations to structure the arrangements of the UK's withdrawal from the EU and to identify a framework for its future relationship with the EU,<sup>86</sup> including in the area of services, were handicapped by the failure of a badly-divided UK Government to identify what precisely its negotiating objectives were.

***'negotiations [...] were handicapped by the failure of a badly-divided UK Government to identify what precisely its negotiating objectives were.'***

This situation ended in July 2018, when after ten hours of intense discussion at the Prime Minister's official residence at Chequers, a declaration, and a more detailed communiqué, were issued, announcing the Cabinet had endorsed Prime Minister May's plan for a UK-EU free trade area and closely linked customs relationship with the EU.<sup>87</sup> The Chequers proposal envisaged a UK-EU free trade area with a common rule book for industrial goods and agricultural products. Remarkably, however, given the importance of services, it envisaged that a more restrictive regime would apply limiting mutual access by the UK and the EU to each other's services markets - the explicit aim being that by retaining regulatory flexibility for this sector, restricted access to EU markets would be compensated for because "potential trading

equal access in all those areas of services without agreeing to obey the same rules as everybody else? I'm afraid I think that's not a negotiation, that is something for a fairy godmother. It's not going to happen." (See D. Staunton, 'Liam Fox Says Post-Brexit Customs Union Would be 'Sellout'', Irish Times (27.02.2018).

81 See S. Weatherill, 'What 'Mutual Recognition' Really Entails: Analysis of the Prime Minister's Mansion House Brexit Policy Speech', EU Law Analysis, 4.03.2018), 2.

82 Ibid., 3 and note by the same author the observation that "the EU is not simply a system of rules, it is a system too that involves the oversight of the Commission, the place of sector-specific agencies, the authority of the Court of Justice and the everyday involvement of national courts and administrative agencies. Rules – but also supervision, administrative cooperation, interpretation and enforcement too." (Ibid., 2)

83 Ibid. While simultaneously expressly asserting that the UK would not accept the rights of Canada and the obligations of Norway – something, however, no-one had ever demanded.

84 Ibid.

85 May's Mansion House approach is open to a fourth criticism that it would also have undermined the Single Market by separating the four fundamental economic freedoms from one another. This is a topic returned to in the text below however, and so can be left aside for now.

86 See Article 50 TEU.

87 See T. McTague, 'Theresa May Wins Agreement for New UK Brexit Offer', Politico (6.07.2018).

opportunities outside the EU are the largest”.<sup>88</sup> There was however a strong element of the UK trying to have its cake and eat it with these plans,<sup>89</sup> since although nominally giving up on its mutual recognition model in the financial services field, the UK Government effectively merely repackaged it, indicating it was going to seek “arrangements on financial services that preserve the mutual benefits of integrated markets”.<sup>90</sup>

Chequers - a tortuously arrived-at attempt to create some kind of consensus within the UK’s ruling Conservative Party - was effectively stillborn as a viable negotiation strategy, however, with Barnier reportedly regarding it as an attempt to achieve what David Cameron had sought but failed to obtain in his negotiations with the EU prior to the June 2016 Brexit referendum: effectively providing billions in savings for UK service providers by releasing them from the application of EU regulations.<sup>91</sup>

### The July White Paper

Shortly after the Chequers declaration, the UK Government released a White Paper outlining in more detail its desired terms for the future UK-EU relationship.<sup>92</sup> Its terms regarding services did indeed seem improbably ambitious for a country explicitly renouncing participation in the Single Market.<sup>93</sup> Among such expressly declared objectives were an unprecedented level of EU-UK mutual recognition of professional qualifications for a non-EU Member State;<sup>94</sup> and a special regime for professional and business service providers (including legal, accounting and audit services).<sup>95</sup> In the field of financial services, although the

UK’s (in any case hopeless) quest for a passporting regime was explicitly abandoned (as something ‘intrinsic’ to a Single Market itself now being left behind), language suggesting mutual recognition nonetheless remained, with references to “a coordinated approach leading to compatible regulation”, a proposal for “a new economic and regulatory arrangement with the EU in financial services”, and stress being put on an approach based on a “judgement of the equivalence of outcomes achieved by the respective regulatory and supervisory regimes”. The White Paper argued that existing frameworks for equivalence “would need to be expanded, to reflect the fact that equivalence as it exists today is not sufficient in scope for the breadth of the interconnectedness of UK-EU financial services provision.”<sup>96</sup> The Paper also proposed regulatory dialogue, with the UK and the EU being able to comment on each other’s proposals at an early stage.<sup>97</sup>

The White Paper was coolly received by the EU. In the first place, the EU objected to any suggestion that the White Paper’s proposal for institutional arrangements, including arbitration to govern a future EU-UK relationship,<sup>98</sup> might apply to equivalence decisions in the financial services area (and would give the UK more influence over such decisions outside the EU than it had inside it<sup>99</sup>) and any such suggestion was quickly retreated from.<sup>100</sup> Furthermore, EU Chief Brexit negotiator Michel Barnier also objected to the undermining of the Single Market involved in the White Paper’s broad aim of the UK keeping the free movement of goods but ridding itself of the obligation to allow free movement either of people or of services.<sup>101</sup>

88 See para. 6(b) of the Chequers statement (HM Government, 6 July 2018) and for a useful summary of the Chequers proposals, Anon., ‘Key Points of Post-Brexit Trade Plan’, RTE news website (9.07.2018). The irony involved here did not escape Rogers, who observed that “as for Westminster...we are deep in the Alice in Wonderland world of politics where the vast bulk of the peculiarly antiquated debate about our trading future has been focused on goods and tariffs issues.” (Rogers, loc. cit., n. 12, 14.) See for expressions of concern from the world of business that services could become an afterthought in the Brexit negotiations, C. Kepple, ‘Draft Text of Brexit Withdrawal Agreement to be Published ‘Within Two Weeks’ – Varadkar’, Irish Independent (23.02.2018).

89 Perhaps not surprisingly, given the previous insistence by Government ministers that services must be part of any Brexit deal. (See S. Jack, ‘Brexit: Business Secretary Greg Clark Warns on Services’ BBC News (21.06.2018); and J Rankin, ‘UK Cannot Have a Special Deal for the City, Says EU’s Brexit Negotiator’, The Guardian (18.12.2017), in which David Davis, the then Brexit minister was reported to have asserted (with a remarkable degree ofchutzpah) that he would not allow the Commission to ‘cherry-pick some sectors’ in negotiations or allow services to be separated from goods.

90 Ibid., para. 6(b). See also Tarrant et al, op. cit., n. 28, 2. The Prime Minister’s apparent quest to attain EU-UK customs unity, regulatory alignment and the simultaneous delivery of a fully sovereign trade policy across both goods and services was sardonically described by former UK Permanent Representative to the EU, Sir Ivan Rogers as an aspiration to achieve an “an amazing three card trick” involving painfully obvious internal contradictions. (See Rogers, loc. cit., n. 12, 15.)

91 See J. Barigazzi, ‘Brussels: May’s Brexit Plan Would Save UK Business Billions’, Politico (27.08.2018).

92 HM Government, The Future Relationship Between the United Kingdom and the European Union (Cm 9593, 12 July 2018)

93 And insisting on an end to free movement, although nonetheless seeking reciprocal arrangements allowing businesses to “move their talented people”. (See Rubric 1.4.2) See for a prescient prediction that there would be no single market access for financial services outside the single market, however, W. Münchau, ‘An Old-Fashioned Economy Heads Towards a Downfall’, Financial Times (20.11.2017).

94 See Rubric 1.3.2 of the White Paper.

95 Rubric 1.3.3 of the White Paper.

96 See generally Rubric 1.3.4 of the White Paper.

97 See para. 69 of the White Paper. This was in addition to proposed extensive supervisory cooperation. (Ibid.)

98 See Chapter 4 of the White Paper.

99 See for further elucidation in this regard, Tarrant et al, op. cit., n. 28, 7 and 9.

100 See A. Barker, ‘Barnier Eases Opposition to May’s Brexit Plan for City of London’, Financial Times (30.07.2018).

101 See C. Cooper, ‘Michel Barnier: UK Brexit Plan ‘Undermines’ Single Market’, Politico, (2.08.2018). Weatherill’s comment that much of what happened after the giving of Article 50 notice in March 2017 “involved a desire to retain the benefits of EU membership while shrugging off the status and responsibilities of membership” seems apposite here. (See Weatherill, loc. cit., n. 83, 1.)

Unsurprisingly, the future relationship later agreed upon in framework form by the UK and the EU looked nothing like what had been envisaged at Chequers or in the UK Government's July White Paper.

### The Withdrawal Agreement and Associated Political Declaration

After lengthy negotiations, a 585-page *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (the so-called 'draft Withdrawal Agreement') was eventually published on 14 November 2018. Concerned (as its title might suggest) with the departure of the UK from the European Union, rather than the subsequent economic relationship between the UK and the EU, the Agreement nonetheless contained at least two articles of particular interest to the free movement of services: Article 126 which provides that there is to be a transition period, starting on the date of entry into force of this Agreement and supposedly ending on 31 December 2020;<sup>102</sup> and Article 127, paragraph 1 of which provides that Union law – in other words, the whole *acquis* including the law on the free movement of services – is to be applicable to and in the United Kingdom during the transition period.<sup>103</sup>

In a vote on the withdrawal agreement held on 15 January 2019, the House of Commons rejected the Withdrawal Agreement by a margin of 230 votes (432 to 202),<sup>104</sup> however, thereby risking that the Article 126 transition period (along with the rest of the Withdrawal Agreement) would never enter into force, and thus that no transition period would ever occur.<sup>105</sup>

A *Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom*<sup>106</sup> accompanied the Withdrawal Agreement. Unlike the Withdrawal Agreement itself, this is legally non-binding. It set out some broad principles (although lacking important details), which would supposedly guide post-Brexit transition period negotiations, including on services. Hence it declared that:

*the Parties should conclude ambitious, comprehensive and balanced arrangements on trade in services and investment in services...respecting each Party's right to regulate. The Parties should aim to deliver a level of liberalisation in trade in services well beyond the Parties' World Trade Organisation (WTO) commitments and building on recent Union Free Trade Agreements (FTAs).*

*In line with Article V of the General Agreement on Trade in Services, the Parties should aim at substantial sectoral coverage, covering all modes of supply and providing for the absence of substantially all discrimination in the covered sectors, with exceptions and limitations as appropriate. The arrangements should therefore cover sectors including professional and business services, telecommunications services, courier and postal services, distributions services, environmental services, financial services, transport services and other services of mutual interest.*<sup>107</sup>

A number of further paragraphs followed in the declaration setting out aspirational objectives concerning market access and non-discrimination; approaches to regulation, regulatory cooperation and professional qualifications; financial services (with emphasis here, however, being put on the Parties' regulatory and decision-making autonomy, equivalence frameworks and cooperation on regulatory and supervisory matters); the facilitation of electronic commerce; free movement of capital and payments related to transactions covered by any deal; intellectual property; and public procurement, mobility and transport.<sup>108</sup>

Notwithstanding all the impressive-sounding language, however, the Political Declaration (its ambition inevitably curtailed thanks to Prime Minister May's rigid adherence to her anti-free movement red line) has been justifiably panned for its lack of ambition, and for having explicitly endorsed the '*tabula rasa*' route, meaning that "both sides will begin with their WTO commitments, and the EU side with its commitments in existing FTAs, and work up from there."<sup>109</sup> Rogers (a former UK Permanent Representative to the EU) has predicted that:

<sup>102</sup> Under Article 132, this period is extendable for up to two years however.

<sup>103</sup> However, the UK will no longer be represented in EU institutions or participate in the decision-making and decision-shaping process of the EU. See generally Part IV of the Agreement. A useful brief summary of the Agreement is to be found in the Proposal for a Council Decision on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (COM (2018) 834 final (Brussels, 5 December 2018)).

<sup>104</sup> See H. Stewart, 'May Suffers Heaviest Parliamentary Defeat of a British PM in the Democratic Era', *The Guardian* (16.01.2019).

<sup>105</sup> This long-anticipated transition period gradually diminished in value the longer it took to be agreed, however, and then subsequently continued diminishing the longer it took to secure parliamentary approval as part of the Withdrawal Agreement. (See P. Jenkins, 'Banking on a Back-to-Back Brexit', *Financial Times* (11.03.2017)).

<sup>106</sup> XT 21095/18 (Council of the European Union, Brussels, 22 November 2018)

<sup>107</sup> See Paras. 29-30 of the Political declaration.

<sup>108</sup> See paras. 31-65 of the Political declaration. See also H. McGrath, 'FS Free Movement of Capital under Brexit Deal', *FS Tech* (15.11.2018).

<sup>109</sup> Rogers, *loc. cit.*, n. 12, 13, where he points out that "the Political declaration cites Article V of the GATS (General Agreement on Trade in Services) which just sets out the basic requirements for two WTO members trading solely on WTO terms which seek to embark on Free Trade Agreement negotiations."



when we get into [post-Brexit talks], we will discover, at a granular level, just how bad it is to start from a tabula rasa third country baseline on services. And we shall then spend a lot of negotiating capital and use a lot of concessions on other issues – and the free movement of people question is, as we have seen, intimately linked to services provision – to try and lever up our level of market access into what used to be our home market to something nearer Single Market levels.<sup>110</sup>

The Political Declaration manifested no intent to adjust the EU's existing equivalence regime.

**'... it seems more unlikely than ever that UK financial service providers outside the Single Market will ever gain access to EU markets in post-Brexit negotiations on the basis of any mutual recognition regime'**

As will have been clear from the text above, what the UK had been seeking had evolved from explicitly seeking mutual recognition to accepting equivalence – but in “a bespoke form[...] that would include significant elements of a mutual recognition regime”.<sup>111</sup> What is on offer is less appealing, however, and it seems more unlikely than ever that UK financial service providers outside the Single Market will ever gain access to EU markets in post-Brexit negotiations on the basis of any mutual recognition regime.<sup>112</sup> It is not for nothing that the chief executive of UK Finance (the trade body for the UK banking industry) has described the Political declaration as being “quite frankly...not worth the paper it is written on.”<sup>113</sup>

## Ground Zero: the Looming Danger of a No Deal Scenario

Whatever the flaws of the Political Declaration, as the date of expiry of the UK's Article 50 notice in March 2019 has approached without parliamentary approval at Westminster of the negotiated deal, the far less appealing prospect of a no-deal Brexit has reared its frightening head to an ever-growing extent.<sup>114</sup> Already, in November 2018, the Commission had launched a Contingency Action Plan announcing that there would be unilateral measures to limit damage and mitigate the most severe consequences of a no-deal Brexit. A month later (and in line with the December European Council conclusions), the Commission adopted all legislative proposals and delegated acts that had been announced in the Contingency Plan. The idea is that contingency measures will not mitigate the overall impact of a ‘no-deal’ scenario or in any way compensate for the lack of stakeholder preparedness or replicate the benefits of EU membership or the terms of any transition period.<sup>115</sup> Moreover, they will be limited to specific areas where it is absolutely necessary to protect the vital interests of the EU (and where preparedness measures alone are insufficient); will be temporary in nature; will be unilaterally adopted by the EU in pursuit of its own interests; and be revocable at any time.<sup>116</sup>

Six sector-specific contingency measures were proposed or adopted by the Commission in the services field.<sup>117</sup>

In the financial services field, where the imposition of a uniformly harsh regime in the event of a no-deal Brexit would risk hurting the EU27's financial sector more than the UK,<sup>118</sup> the Commission adopted a temporary equivalence decision for twelve months to avoid disruption in the central clearing of derivatives (by allowing the European Securities and Market Authority to recognise temporarily central counterparties established in

110 Ibid., 15. A similarly downbeat assessment of the deal is given in J. Johnson, ‘Politicians Must Stand up for the City after EU exit’ Financial Times (21.02.2019), which was written by a former Minister for Transport in Theresa May's government

111 Tarrant et al, op. cit., n. 28, 2. Judging by subsequent economic analysis published by the UK Government, such an adjustment nonetheless still appears to be an objective of the UK Government in future trade negotiations, however. (Ibid.)

112 Ibid. It was concerns about a potential lack of availability of passporting rights (i.e., mutual recognition) which led Britain's second largest insurer Aviva to decide to move a reputed £9 billion worth of assets to Ireland in February 2019. (See S. Khan, ‘Brexit: Aviva to move £9bn worth of assets to Ireland as it prepares for no-deal outcome’, The Independent (20.02.2019).)

113 See S. Jones, ‘No-deal Brexit Could Return UK to 1930s, Says Senior Banking Figure’, Financial Times (14.01.2019).

114 And thus, as Grey has put it, that “a project cloaked in the sacred cloth of the ‘will of the people’ [was] going to end up being the will of almost no one.” See, C. Grey, ‘Britain in a Tailspin’, The Brexit Blog (8.02.2019).

115 I.e., as provided in the draft Withdrawal Agreement.

116 See European Commission, Preparing for the Withdrawal of the United Kingdom from the European Union on 30 March 2019: Implementing the Commission's Contingency Action Plan (COM (2018) 890 final, Brussels, 19 December 2018), 2-3; European Commission, “European Commission Implements ‘No-Deal’ Contingency Action Plan in Specific Sectors” (Press Release, Brussels, 19 December 2018) and J. Quonn, ‘European Commission Unveils Plans in the Event of a No-Deal Brexit’, Newstalk.com News (2.10.2019).

117 Of a total of fourteen measures.

118 See in this regard the prescient article by J. Ford, ‘Why a Hard Brexit for Financial Services is Unlikely’, Financial Times (10.12.2017). Regulators and industry participants could forestall difficulties in certain financial service areas without the need for the intervention of legislation. See regarding the asset management industry, C. Flood, ‘European Financial Regulators Move to Mitigate Brexit Threat’, Financial Times (10.12.2017).

the UK); a temporary equivalence decision for 24 months to avoid disruption in services provided by UK central securities depositories (allowing them to continue providing notary and central maintenance services to operators in the EU); and two delegated regulations facilitating novation, for a fixed period, of certain over-the-counter derivatives contracts with a counterparty established in the UK (allowing the transfer of such contracts to an EU 27 counterparty while maintaining their exempted status under the European Market Infrastructures Regulation).<sup>119</sup>

In the field of air transport, a no deal Brexit would threaten the continuation of basic connectivity.<sup>120</sup> The Commission thus adopted a draft regulation aimed at ensuring, for twelve months, the provision of ‘point-to-point’ (i.e., UK to EU 27 and vice versa) air services,<sup>121</sup> as well as a draft regulation on aviation safety extending the validity of certain existing licences (thereby covering the basic needs of Member State economies and mitigating to some extent the impact of withdrawal without guaranteeing the continuation of all air transport services under their present terms).<sup>122</sup> Both draft measures were aimed at avoiding the abrupt interruption of air traffic between the EU and the UK as of the date of Brexit.

In the field of road haulage, the Commission adopted a draft regulation<sup>123</sup> allowing temporarily for 9 months UK-licensed road haulage operators to carry goods between the UK and the EU27 and thereby avoiding the severe restriction of road haulage between the EU and the UK and the introduction of an international system of limited quotas.<sup>124</sup>

By now, some commentators regard an extension of Article 50 exit deadline as ‘inevitable’ with the real debate being as to how long.<sup>125</sup> The most recent developments provide some support for this.<sup>126</sup>

## Endgame?

To date, the process of negotiating Brexit and of commencing the process of teasing out its potential implications for the free movement of services has demonstrated three important truths.

First, due to the imbalance of power between the departing state and the EU, exit ‘negotiations’ (rather like accession negotiations) are more accurately characterised as involving the effective imposition of a new trading relationship by the EU.<sup>127</sup>

Secondly, a failure by a departing state to produce its own proposals in timely fashion will inevitably lead, to the EU setting the agenda.<sup>128</sup> The successful deployment of Article 50 requires an exiting country to be clear-sighted and united both about its objectives and the losses it is prepared to accept in order to attain them.<sup>129</sup> As has been seen, however, the UK’s Chequers plan emerged only in July 2018. The failure of the UK Government to indicate any earlier in Brexit negotiations the nature of the trading relationship it wanted with the EU was scarcely surprising: the pro-Brexit side had shrewdly declined to define its preferred relationship prior to the June 2016 referendum, thus carrying the maximum number of voters with it. This approach carried with it, however, the inevitable handicap that once the referendum was won, no consensus existed on the direction the country should take: including as regards trade in services, making it well nigh impossible for the UK to set the agenda in any discussions on the future trading relationship.<sup>130</sup>

Thirdly, the need to safeguard the Union and the Single Market will always rank ahead of immediate trade considerations as far as the EU is concerned. In the Brexit negotiations, this

119 See regarding earlier concerns expressed in this field, C. Binham, ‘BoE Calls for Brexit Withdrawal Bill to Address Cross-Border Financial Contracts’, *Financial Times* (1.11.2017).

120 See further in this regard the European Commission Memorandum, Questions and Answers: the Consequences of the United Kingdom Leaving the European Union Without a Ratified Withdrawal Agreement (No Deal Brexit) (Memo/16/, Brussels, 19 December 2018), 4.

121 Subject to the UK conferring equivalent rights on EU carriers and ensuring conditions of fair competition. If reciprocity is not forthcoming, the draft measure will enable the Commission to adopt appropriate measures e.g., adjusting the allowable capacity available to UK carriers, or requiring Member States to adapt, refuse, suspend or revoke the operating authorisations of UK air carriers. (Ibid., 5.)

122 Ibid.

123 To operate subject to the UK conferring the equivalent rights on Union road haulage operators and subject to conditions ensuring fair competition.

124 See generally in relation to all six measures European Commission, Preparing for the Withdrawal of the United Kingdom from the European Union on 30 March 2019: Implementing the Commission’s Contingency Action Plan (COM (2018) 890 final, Brussels, 19 December 2018) 5-7.

125 See e.g., A. Gostyńska-Jakubowska, Can the UK Extend the Brexit Deadline? (Centre for European Reform, February 2019), 4.

126 See G. Parker, J. Pickard and J. Blitz, ‘May opens way for ‘short’ Brexit delay to appease pro-EU Tories’, *Financial Times* (27.02.2019)

127 As Grant has pointed out,


“leaving the EU is like joining it. Countries wanting to join engage in ‘accession negotiations’, but that is a misnomer. The accession process in fact involves the EU imposing its terms on the country concerned. If it does not like those terms it does not have to join. The details can be debated but not the basic deal that the EU offers. Every country that has joined the EU has put up with this unequal ‘negotiation’ in order to get into the club. Leaving the EU is a similar process... the EU decides what kind of deal will work. Then the exiting country has to accept those terms – if it wants a deal, and it will, since leaving without one would be hugely damaging to its economy.”

(C. Grant, *The Lessons of Brexit* (Centre for European Reform, London, 2019) 3 at 4.)

128 Ibid., 5.

129 Rogers, loc. cit., n. 12, 27.

130 Ibid., 8.



factor – allied to an unwillingness to establish a risky precedent for other states both inside and outside the EU – has led to an insistence by the EU27 on the indivisibility of the four freedoms in the Brexit negotiations, notwithstanding UK confidence that its importance as a trading partner would inevitably lead to its being accorded a more favourable approach than had heretofore been made available in trade negotiations.<sup>131</sup>

***‘... the need to safeguard the Union and the Single Market will always rank ahead of immediate trade considerations as far as the EU is concerned’***

Instead, the EU’s adherence to its usual approach effectively restricted the UK to a choice between a Norway-style regime - completely in the Single Market - or a Canada-style free trade agreement, completely outside it.<sup>132</sup>

As regards the future, the UK now stands in great danger of being about to discover by experience – the bitterest way of learning<sup>133</sup> - two painful lessons. First, that “it is fatuous to suggest that when you immediately substantially worsen your terms of trade in services with massively your largest market...instant trade deals with other fast-growing regions will, on services, substitute for the loss” (for in reality, the losses incurred will be sizeable and certain, the potential gains merely speculative).<sup>134</sup> Secondly, and for an indefinite period stretching far into the future, the UK may find itself ruefully reflecting on the wisdom of the advice of its own former Permanent Representative to the European Union that “deeper liberalisation, notably on services[...] is much tougher to achieve than on tariffs and is always easier within a bloc than with markets outside it”.<sup>135</sup>

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131 See T. Connelly, ‘Brexit: Hell, High Water and the Return of Chequers’, RTE News (9.02.2019), 15.

132 See W. Münchau, ‘An Old-Fashioned Economy Heads Towards a Downfall’, Financial Times (20.11.2017); Grant, op. cit., n. 138, 7-8.

133 To the fifth-sixth century BC Chinese philosopher and teacher, Confucius, is attributed the saying “by three methods we may learn wisdom: first, by reflection, which is the noblest; secondly by imitation, which is the easiest; and third by experience, which is the bitterest.”

134 Rogers, loc. cit., n. 12, 17-18. As another former eminent civil servant Sir Martin Donnelly characterised such an approach,

“you’re giving up a three-course meal, the depth and intensity of our trade relationship across the European Union and partners now, for the promise of a packet of crisps in the future, if we manage to do trade deals in the future outside the EU which aren’t going to compensate for what we’re giving up.”

(See J. Elgot, ‘Leaving Single Market ‘Like Swapping a Meal for a Packet of Crisps’, Warns Ex-Trade Chief’, The Guardian (27.2.2018).)

135 Emphasis added. Cf. the comments of the Chair of the Commons Treasury Committee reported in P. Jenkins and O. Ralph, ‘Morgan Backs ‘Passporting’ Pacts for City Beyond Europe’, Financial Times (25.01.2019).

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